Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALICE B. HUGHES,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE PETITIONER, A LICENSED PRACTICAL NURSE EMPLOYED AT THE WRIGHT PATTERSON AIR FORCE BASE, OHIO MEDICAL CENTER, HAVING QUALIFIED SEVERAL YEARS PREVIOUSLY TO ACCESS THE SECURED PRESCRIPTION AREA, WAS ENTITLED TO RECEIVE NOTICE AND OPPORTUNITY TO RESPOND PRIOR TO THE SUMMARY REVOCATION OF HER ACCESS TO THE SECURED AREA.

II. WHETHER AN AGENCY THAT PLACES AN EMPLOYEE ON ENFORCED LEAVE AND SUSPENSION MUST COMPLY WITH THE DUE PROCESS PROCEDURE OF ITS REGULATION, WHICH REGULATION, EXCEPTING MEDICAL AND EMPLOYEE WELFARE CASES, REQUIRES THE AGENCY TO PROVIDE DISCIPLINED EMPLOYEE ADVANCE NOTICE AND OPPORTUNITY TO RESPOND AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

LIST OF PARTIES

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PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CITATIONS TO OPINIONS BELOW

Grievance of Alice B. Hughes, *In The Matter of Arbitration Between Air Force Logistics Command WPAFB, Ohio, and American Federation of Government Employees*, AFGE Council No. 214, Expedited Arbitration No. AFB WP-91-3. June 14, 1991.

Alice B. Hughes v. *Department of The Air Force*, United States of America Merit Systems Protection Board, Docket Number CH-0752-92-0473-1-1. Chicago Regional Office, July 23, 1992.

Alice B. Hughes v. *Department of The Air Force*, United States of America Merit System Protection Board, Docket Number CH-0752-92-0473-1-1, Chicago Regional Office, December 2, 1992.

Alice B. Hughes v. *Merit Systems Protection Board*, (U.S. Court of Appeals for the Federal Circuit), Case No. 93-3129 on appeal from Merit Systems Protection Board, October 7, 1993.

Alice B. Hughes v. *Merit Systems Protection Board*, (U.S. Court of Appeals for the Federal Circuit), Case No. 93-3129, Notice of Entry Of Judgment Without Opinion, October 9, 1993.

Alice B. Hughes v. *Merit Systems Protection Board*, (U.S. Court of Appeals for the Federal Circuit), Case No. 93-3129, Correction, Issued As A Mandate, January 14, 1994.

JURISDICTIONAL GROUNDS

The judgment of the Federal Circuit Court of Appeals was issued October 7, 1993, and entered of record October 9, 1993. Said entries' dates were recalled and corrected, which decision was issued as a mandate January 14, 1994. Jurisdiction is invoked pursuant to 28 U.S.C. 1257(3) in that petitioner was deprived of rights secured her by the United States Constitution. Also, the Rules of this Supreme Court grants jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

The "due process clause" of the Fifth and Fourteenth Amendments of the United States Constitution

2. Statutes

5 U.S.C.A. 7501(2)

> For the purpose of this subchapter—
> (2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

5 U.S.C.A. Sec. 7511(a)(1)(A)

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

5 U.S.C.A. Sec. 7511(a)(2)

(a) For the purpose of this subchapter—

(2) "suspension" has the meaning as set forth in section 7501(2) of this title.

5 U.S.C.A. Sec. 7701(a)(1)

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept.

28 U.S.C. 1257(3)

3. **Agency Regulations**

5 C.F.R. Sec. 752.201-203

AF Regulation 40-750, Sec. E. Parag. 23(a)(2)

AF Regulation 40-750, Sec. E. Parag. 18(a) and (b)

AF Regulation 168-50, Parag. 3(e), 3(f)(2) and 6(c)

STATEMENT OF THE CASE

This is a Petition For The Writ of Certiorari To The United States Court of Appeals For The Federal Circuit for the record of its decision in Case Number 93-3129.

The petitioner, Alice B. Hughes, is a Licensed Practical Nurse employed in the Medical Clinic at WPAFB, Ohio. After receiving a negative arbitration ruling on June 14, 1991, on May 23, 1992, she submitted to the Merit System Protections Board her appeal of the agency's decision having suspended her on two separate occasions.

In the Initial Decision dated July 23, 1992, the Board held no jurisdiction over the requested appeal for reason the suspension was less than 14 days, and subsequently denied reconsideration.

On December 26, 1992, petitioner filed her petition for review with the United States Court of Appeals For The Federal Circuit, which Court affirmed the MSPB Decision.

Petitioner has been employed as a full time permanent civil service employee, licensed practical nurse, by the Agency, WPAFB Medical Center, for over twenty-one (21) years. Prior to this incident, she had an excellent work record on this job as an LPN at the Medical Center, as reflected by outstanding and excellent performance ratings.

At the time of this incident, petitioner's job duties consisted of working as an LPN and substituting in specific areas for RNs in the Gastroenterology Clinic (G.I.), providing care for patients, including sedated recovering patients.

She had worked in this manner for seven years without any discrepancy in her performance.

While working in G.I., pursuant to USAF MC Regulation 168-50, petitioner received clearance and was authorized and granted access to the secured prescription medicine cabinet, and she carried the cabinet keys on her person for this pur-

pose. Said regulation providing this authority is still in effect at the time appellant initiated the agency appeal. Also, some time prior to this incident, petitioner inquired about being up-graded from GS-6 to GS-8, which up-grade would reflect the greater responsibilities she performed, since petitioner was substituting as stand-in for registered nurses.

On September 14, 1990, Lt. Col. Oczkowski, the unit supervisor, and petitioner's second level supervisor, asked petitioner to work September 17, 1990. Petitioner replied that she had arranged for annual leave for the period September 17-28, 1990, returning on October 1, 1990.

On October 1, 1990, the day petitioner returned from leave, Lt. Col. Oczkowski requested petitioner to provide her the keys used to access drug storage cabinet, at the end of the work shift. Petitioner provided her the keys.

On October 2, 1990, petitioner received a letter from Col. Taylor and Lt. Col. Oczkowski revoking her authority to administer controlled drugs and access to the secured drugs cabinet.

After giving up the keys to access the secured drug storage unit, and during the month of October, 1990, petitioner continued to work in the Gastroenterology Clinic as completely as possible. However, she sensed that working alone in the clinic regularly without immediate access to the secured drug cabinet, presented a danger to recovering and sedated patients who were required to receive certain prescription drugs as necessary.

Petitioner verbally expressed this feeling of present danger and the inability to immediately respond to recovering patients' needs to her immediate and first level supervisor, Major Rose Marie Barrientez; petitioner, therefore, told the Major that she felt very uncomfortable about working in the G.I. Clinic. Consequently, petitioner did not wish to continue to work there alone, for fear of incurring responsibility for not being able to contact another employee with access to the

secured prescription drug area if a patient had an urgent need for a prescribed drug.

Since July 23, 1986, petitioner was authorized to carry keys for access to the secured prescription drugs prescribed by treating physicians as deemed necessary to administer to patients in the recovery room. Petitioner felt that the revoking of authority to access the secured drug cabinet jeopardized her position as attending LPN and endangered the lives of patients she was charged to provide care, since she regularly worked alone in the recovery area. Thus, if a recovering patient incurred an adverse reaction, including cardiac arrest or seizure, the patient could expire if there were a delay in administering a prescribed drug.

The Agency alleges that on or about October 29, 1990, petitioner refused an order to work in the G.I. Clinic. The order directing her to work was supposed to have been given by Nurse Vandergriff as instructed by Lt. Col. Oczkowski.

On October 30, 1990, Lt. Col. Oczkowski, Internal Medicine Coordinator, entered petitioner's office in a rude manner making unfounded accusations and stating she had a discussion with Marlene Vandergriff, R.N., that petitioner had refused to work part time in G.I. on the date of October 29, 1990. Petitioner asked Lt. Col. Oczkowski to lower her voice so that patients would not be disturbed, but the Lt. continued and petitioner excused herself to complete serving patients per doctor's order. Petitioner subsequently went back to her office and Lt. Col. Oczkowski again entered and stated to petitioner that she will obey her command to work in the G.I. Clinic on November 2, 1990, or "do not report for duty". Petitioner stated that she would not neglect her duties here on verbal orders and asked Lt. Col. Oczkowski to please put her statements about not reporting for duty in writing with Col. Taylor's signature. Lt. Col. Oczkowski left the floor for a few minutes and returned with the signature. At approximately 11:30 a.m., Lt. Col. Oczkowski returned to the clinic and petitioner again requested her to be allowed to care for the Gold Clinic patients who were waiting.

On November 2, 1990, as petitioner was in the treatment room working, Lt. Col. Oczkowski entered and asked if petitioner was going to work G.I.? Petitioner explained to Lt. Col. Oczkowski that she tried working G.I. without the keys to access the secured drug cabinet and could not respond to doctor's orders to provide needed drugs to patients and felt uncomfortable for patient safety. Lt. Col. Oczkowski replied to petitioner to go home and leave the building.

On November 6, 1990, while serving her five day suspension, petitioner was called at her residence by Lt. Col. Oczkowski advising her that she was AWOL.

On return to her job after the enforced leave, petitioner arrived at her duty station at 7:30 a.m. on November 9, 1990; and she was approached by her first level supervisor, Maj. Barrientez, who inquired whether or not she intended to work in the G.I. Clinic that day. Petitioner responded that she felt extremely uncomfortable attempting to perform her duties without access to the secured medication cabinet, since the lack of access deprived her of the ability to provide quality patient care. Petitioner explained to Maj. Barrientez that she was not able to fully perform the job in the G.I. Clinic unless able to address patient medical needs by having access to physician prescribed medications. Maj. Barrientez acknowledged the validity of petitioner's position and stated that she was not going to require her to work in the G.I. Clinic without being able to administer prescribed medications to sedated patients.

On this same date, November 9, 1990, petitioner called Congressman Hall's office in Washington, D.C., spoke with Ms. Randi Foster and requested assistance for her employment status. Ms. Foster informed petitioner that she had spoken with Col. Cunningham and to call him for the employment status. Petitioner called Col. Cunningham who replied that he was not aware of this incident and would contact Nursing Services. He then advised Mrs. Hughes to call Jeff Van Vorhis about her employment status. Petitioner contacted Jeff Van Vorhis, Civilian Employment Relations

Specialist, who informed petitioner that she was in an AWOL status from November 2-9, 1990. Petitioner read the suspension notice to him, but he insisted that petitioner was AWOL.

On December 21, 1990, petitioner was given notice of a proposed second suspension with 21 days to reply. During this time, petitioner continued functioning in G.I. with extreme fear for safety of the sedated patients.

On January 25, 1991, petitioner was given the decision to suspend for the period of January 30 and 31, 1991. Notwithstanding petitioner's written response, she was still suspended.

Since this incident, Lt. Col. Oczkowski has been reassigned and is no longer at WPAFB and petitioner continues to work in recovery but not alone and with another employee who has access to the secured drug storage cabinet.

REASONS FOR GRANTING THE WRIT

1. This case presents the opportunity for this Court to consider the question whether an employee's right to due process of law as guaranteed by the Federal Constitution is violated when a granted security clearance has been revoked in a non-military setting, a hospital environment.

2. Further, this case presents the opportunity for this Court to consider a specific situation of agency alleged discipline and suspension of an employee when there is the lack of any wrong on the part of the employee and when that employee has not been provided due process of law as guaranteed by the Federal Constitution.

ARGUMENT

Summary

Petitioner contends that by the agency arbitrarily revoking her authority to access the secured prescription drug area, this action was in violation of her due process rights and tantamount to a demotion contrary to AFR 168-50.

Further, petitioner contends that the agency violated AFR 40-750 by not strictly complying with the notice requirements, since there was the failure to grant her, as an employee of the U.S Department of the Air Force, the traditional seven (7) days notice and opportunity to respond prior to her suspension. Petitioner's suspension was an adverse action within the meaning of 5 C.F.R. Sec. 752.201-203.

5 U.S.C.A. Sec. 7701(a) provides that the MSPB has jurisdiction to review an agency's final decision upon the agency violation of a rule. Further, pursuant to 5 C.F.R. Sec. 1201.3(a), the Board has jurisdiction to review agency actions when the appeal is authorized by law, rule, or regulation. In the instant case, petitioner contends the agency has violated Department of Air Force Regulation 40-750 and Department of Air Force Medical Center Regulation 168-50. 5 U.S.C.A.

7503 provides that an employee against whom a suspension for 14 days or less is proposed is entitled to (1) advance written notice (2) a reasonable time to respond orally or in writing with affidavits or other documentary evidence (3) representation by attorney or representative (4) written decision of specific reasons, therefore.

1. Revocation of Access

On October 1, 1990, petitioner's second level supervisor, without prior notice and opportunity to respond; terminated petitioner's access to the secured prescription drug area. In *Simmons* v. *Department of Navy*, 49 M.S.P.R. 264 (1991); see also *Egan* v. *Department of Navy*, 28 M.S.P.R. 509, 519 (1985), affirmed, 868 F.2d 1277 (Fed. Cir. 1988), and *Jones*, 48 M.S.P.R. 691-692, there, the Board held that the due process rights that must be afforded to an employee whose access to classified and secured areas has been suspended, include the following: (1) notice of the agency's determination regarding the employee's access; (2) a statement of the reasons for the determination; and (3) an opportunity to respond. In the present case, petitioner never received notice nor opportunity to respond to the agency's revocation of her access to the secured prescription drug area.

In *Egan*, the Board discussed *Rolles* v. *Civil Service Commission*, 512 F.2d 1319 (1975), stating that there the Court of Appeals for the Distict of Columbia stressed that the only issue before it was the legality of the employee's dismissal, finding that the dismissal was repugnant to due process since petitioner there was not afforded the opportunity to respond. There as in the instant case, whereas the Board has no basis to evaluate the validity of the herein agency's revocation of petitioner's access to the secured prescription drug area, notice of the agency's determination, a statement of its reasons in support of the determination and an opportunity for this petitioner to respond should have been provided. *Rolles, supra.* See also *DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985); *Doe* v. *Casey*, 601 F. Supp., 581

(D.D.C. 1985); *Green* v. *McElroy*, 360 U.S. 474, 502, 79 S. Ct. 1400, 1416, 3 L.Ed.2d 1379 (1959), *Cleveland Board of Education* v. *Loudermill*, ____ U.S. ____, 105 S. Ct. 1487, 1495, 84 L.Ed.2d 494 (1985), citing *Arnett* v. *Kennedy*, 416 U.S. 134, 170-71, 94 S. Ct. 1683, 1652, 40 L.Ed.2d 15 (1974).

2. Petitioner's Suspension

On October 2, 1990, petitioner's access to a secured prescription drug area adjacent to the patient recovery room was summarily revoked without notice, explanation, or opportunity to respond. Petitioner, a Licensed Practical Nurse, was not required to work in the hospital recovery area daily, but only when registered nurses had days off or otherwise were not available; as such, petitioner substantially relied upon having access to the secure prescription drug area to properly provide medical needs of recovering patients. For reason that petitioner concluded she would be held responsible if something went wrong in the recovery room as she worked there due to not being able to access the secured prescription drug area, she feared working there.

On October 31, 1990, petitioner was handed a conditional statement, which essentially stated, without more, that if she did not work the recovery room on November 2, 1990, she would be sent home. Petitioner contends that this conditional statement did not constitute the required notice for her suspension since at the time received she had not committed any wrongful act. Further, the language of the conditional statement related to "prospective conduct" and not "past conduct". Clearly, notice consistent with due process requirements does not specify wrongful conduct which may or may not occur. Upon refusing to work recovery for these stated reasons on November 2, 1990, petitioner was summarily sent home. Petitioner contends that because she was not afforded notice and opportunity to respond pursuant to 5 U.S.C.A. Sec. 7503, her Fifth and Fourteenth Amendment rights were violated. Moreover, as an employee of the Department of Air Force, WPAFB, Ohio, petitioner was entitled to the notice procedures set forth by the Department of

Air Force Regulations, Regulation 40-750, Section E. See Appendix C.

Under the provisions of these said regulations, petitioner was entitled to (1) advance written notice with explanation, (2) reasonable time to respond with affidavits or other documentary evidence, (3) representation by attorney or other representative, and (4) a written decision with specific reasons therefore. Moreover, pursuant to AFR 40-750, Sec. E, Department of Air Force employees are traditionally provided at least a seven (7) day notice prior to any suspension.

The Civil Service Reform Act of 1978 provides that a federal employee has the right to appeal to the MSPB from any action which is appealable to the Board under any law, rule or regulation. 5 U.S.C. Section 7701(a) (1982). This Act also sets forth certain adverse actions from which an employee may appeal, including removal, suspension for more than fourteen days, and reduction in pay. Further, the Act sets forth the nature of these adverse actions, as defining "suspension" as "placing an employee for disciplinary reasons in a temporary status without duties or pay." 5 U.S.C. Section 7501(2), 7511(a)(1)(A), 7511(a)(2), and 7512(2). AFR 40-750.

In the instant case, petitioner, as an employee of the agency for some twenty-one (21) years, was told by her unit's supervisor without prior legal notice of suspension to leave the agency's premises on November 2, 1990, for refusal to obey the supervisor's order. Thereafter, petitioner was sent written notice that she had been suspended. Petitioner remained off her job through November 7, 1990. She received no pay for this time away from the job. This adverse agency action was clearly a suspension within the Civil Service Reform Act.

The Act also requires that in order for the suspension to be appealable, it must have a disciplinary component. In the instant case, petitioner was charged with having failed to carry-out the orders of her unit supervisor to return to work in the G.I. Clinic. Petitioner's failure to respond to the unit super-

visor's order resulted in the supervisor instantly ordering her to leave the agency's premises, remaining off duty without pay for some five (5) days. This suspension falls within the normal meaning of discipline, as punishment intended as sanction for improper conduct. 30 Comp. Gen. 342, 343-44 (1951).

Petitioner's suspension was without prior legal notice and opportunity to respond, pursuant to the AFR 40-750, Section E, 23(a)(2)(b). This regulation provides that the minimum notice period for suspension of 14 days or less must not be less than 24 hours. Further, within the Air Force branch, this period is normally not less than 7 days. Moreover, pursuant to AFR 40-750, Section E, 18(a) and (b), the written statement of notice must be specific and include specific information about the proposed agency's action and reason therefore. Appendix C, at Paragraphs 18(a) and (b), and 23(a) and (b). Petitioner's suspension was instant upon her failure to comply with the alleged legal order given by the unit supervisor on November 2, 1990.

USAF MC Regulation 168-50 is the Department of Air Force rule which is used by its Medical Service Units and establishes procedures for the storage, distribution, administration, and security of drugs. Pursuant to AFR 168-50 subparagraph items 3(e), 3(f)(2) and 6(c), in July, 1986, petitioner was duly authorized as part of her job duties to access the prescription drug storage unit while providing care as further authorized by attending physician, for recovering patients. See Appendix B. No explanation was ever provided by petitioner's unit supervisor as reason for the revocation of petitioner's access to the drug storage unit.

Petitioner requested a written explanation, but none was provided then, nor has been provided to date.

AFR 168-50 does provide for maintaining security by users or persons accessing the prescription drug unit. Specifically, written records of individual access and use are required. No

complaint was provided that petitioner had in any way breached the security requirements as an authorized person.

Because petitioner's authorized access is considered part of her job duties, the denial of access and performance responsibility is tantamount to her being demoted in job without notice and opportunity to be heard, all contrary to the Civil Service Reform Act.

CONCLUSION

The Merit Systems Protection Board has jurisdiction in petitioner's case for the reason that the agency failed to strictly comply with AFR 40-750, by not providing the proper time in giving notice to petitioner upon initially suspending petitioner from her job. AFR 40-750 was promulgated to provide the Air Force policy and principles for maintaining discipline and for taking disciplinary and adverse actions, which provisions are consistent with 5 U.S.C. Chapter 75, 5 C.F.R., Part 752 and DoD Directive 1400.14. AF Regulation 40-750.

Because the agency failed to strictly adhere to AFR 40-750, Section E, Notice Requirements, the agency in fact violated its rules, providing the basis for jurisdiction on appeal of its decision to the MSPB. 5 C.F.R. 7701(a).

Further, the agency's revocation of petitioner's authority to access the prescription drug storage unit resulted in due process denial and petitioner's demotion, all contrary to the Civil Service Reform Act which the MSPB by law is granted jurisdiction to review.

Respectfully submitted,

Herbert Creech, Esquire
1422 Chapel Street
Dayton, Ohio 45404
1-513-228-1086

APPENDIX A

ARBITRATION OPINION AND AWARD

In the Matter of Arbitration Between:

AIR FORCE LOGISTICS COMMAND
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFGE COUNCIL NO. 214

EXPEDITED ARBITRATION
(ARB WP-91-3)

Grievance of ALICE B. HUGHES

APPEARANCES:

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Attorney/Advisor
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Wright-Patterson AFB, Ohio
45433-6000

For the Union: John Tornichio
Union Steward
AFGE Local No. 214
P.O. Box 1505
Fairborn, Ohio 45324

ARBITRATOR: W. Scott Thomson, P.O. Box 22268, Louisville, Kentucky 40252-0268.

By the terms of the Agreement between Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,

hereinafter called "the Employer," and American Federation of Government Employees, AFGE Council No. 214, hereinafter referred to as "the Union," disputes between the parties are to be settled in accord with the grievance and arbitration procedure therein provided. Pursuant to such procedure W. Scott Thomson was selected by the parties as arbitrator to hear a matter concerning a two (2) days' suspension-discipline. A Hearing was held June 7, 1991, at Wright-Patterson Air Force Base, Ohio, in which full and equal opportunity was afforded the parties to make statements and arguments, introduce evidence, and examine and cross-examine witnesses.

STIPULATED ISSUE

Was the disciplinary action based on just cause?

OPINION

Grievant is Alice B. Hughes. She is represented by the American Federation of Government Employees, AFGE Council No. 214.

Grievant is a long-term employee. She has been employed for twenty-one years. She has an excellent work record. However, November 2, 1990, and November 9, 1990, she refused a direct order to work in the Gastroenterology Clinic. Her refusal to follow a direct order was admitted during Hearing. She was suspended two days for these infractions.

It is regrettable the incidents occurred. Previously she had access to the controlled drugs cabinet. She became highly upset when she was informed she was no longer authorized to "carry the keys to the cabinet." Air Force regulation requires special authority for a licensed practical nurse to have access to the drug cabinet. Ms. Hughes became adamant that this hampered the performance of her job. Accordingly, she refused to work in the Gastroenterology Clinic without the "keys to the drug cabinet." Nevertheless, her refusal to obey a

direct order was not warranted. Her refusal was a deliberate act. I have no alternative but to deny the grievance.

AWARD

The grievance is denied.

/s/ W. SCOTT THOMSON
Arbitrator
Date: June 14, 1991

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

DOCKET NUMBER
CH-0752-92-0473-I-1
DATE: July 23, 1992

ALICE B. HUGHES,

Appellant,

v.

DEPARTMENT OF THE AIR FORCE,

Agency.

Raymond W. O'Neal, Sr., Esquire, Dayton, Ohio, for the appellant.

Charles A. Buenning, Jr., Esquire, Wright-Patterson Air Force Base, Ohio, for the agency.

BEFORE

Howard J. Ansorge
Administrative Judge

INITIAL DECISION

INTRODUCTION

Alice B. Hughes is a Practical Nurse in the Medical Clinic at Wright-Patterson Air Force Base, Ohio. Ms. Hughes was issued a 5-day suspension on October 31, 1990 and a 2-day suspension on January 21, 1991. She appealed her suspension to the Board on May 3, 1992. No hearing was held in this appeal.

For the reasons set forth below, this appeal is DISMISSED for lack of jurisdiction.

JURISDICTION

The appellant seeks to appeal a 5-day suspension and a 2-day suspension. The appellant has the burden of establishing by a preponderance of the evidence that the Board has jurisdiction over her appeal. *See* 5 C.F.R. § 1201.56(a)(2)(i) (1992). In her appeal, the appellant disputes the merits of the charges upon which the agency based the suspensions; she claims that the suspensions are excessively harsh given her 22 years of service; she asserts that the agency issued the suspensions in violation of her due process rights; and she maintains that she was suspended in reprisal for attempting to prevent danger to the patients in the clinic.

Notwithstanding the appellant's contentions, the Board's jurisdiction is limited to actions that are appealable to the Board by law, rule, or regulation. *See* 5 U.S.C.A. § 7701(a) (West 1980). It is well settled that the Board does not have jurisdiction over suspensions of 14 days or less. *See, e.g., Harrison* v. *United States Postal Service*, 26 M.S.P.R. 37, 39 (1985); 5 U.S.C.A. § 7501(2) (West 1980). Moreover, the Board has no jurisdiction to review claims of reprisal in the absence of an otherwise appealable matter. *See, e.g., Saunders* v. *Merit Systems Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985); *Wren* v. *Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867 (D.C. Cir. 1982). Accordingly, I conclude that the Board has no jurisdiction over this appeal.

Because the Board has no jurisdiction over this appeal, I need not consider whether the appeal was timely filed.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Howard J. Ansorge
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER CH075292047311

DATE: December 2, 1992

ALICE B. HUGHES,

Appellant,

v.

DEPARTMENT OF THE AIR FORCE,

Agency,

Raymond W. O'Neal, Sr., Esquire, Dayton, Ohio, for the appellant.

Charles A. Buenning, Jr., Esquire, Wright-Patterson Air Force Base, Ohio, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on July 23, 1992, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. After the close of the record on petition for review, see 5 C.F.R. § 1201.114 (d), the agency submitted a response to the petition for review; the Board has not considered this response because the agency has not shown good cause for the delayed filing, *see* 5 C.F.R. § 1201.114 (f). This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, which ever receipt occurs first. *See* U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/ ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL COURT

93-3129
Filed October 7, 1993

ALICE B. HUGHES,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). CH0752920473-I-1.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (MICHEL, Circuit Judge, SMITH, Senior Circuit Judge, and PLAGER, Circuit Judge):

AFFIRMED. Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT
/s/ Francis X. Gindhart, Clerk

Dated October 7, 1993

ISSUED AS A MANDATE: October 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: October 9, 1993

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs are taxed against the Petitioner(s) in favor of the Respondent(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

cc: RAYMOND W. O'NEAL, SR.
ANITA MARSHALL

HUGHES V MSPB, 93-3129
(MSPB — CH0752920473I-1)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-3129

ALICE B. HUGHES,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

JUDGMENT
(Filed January 14, 1994)

Upon further consideration, having learned that the petitioner was erroneously advised of the date on which the original judgment was entered, it is ORDERED AND ADJUDGED:

The judgment entered on October 7, 1993, is withdrawn, and the mandate issued on October 28, 1993 is recalled.

On appeal from the Merit Systems Protection Board, in case no. CH0752920473-I-I, the cause having been heard and considered, it is ordered and adjudged:

PER CURIAM (MICHEL, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and PLAGER, *Circuit Judge*):

AFFIRMED. Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT
/s/ FRANCIS X. GINDHART, Clerk

January 14, 1994

ISSUED AS A MANDATE: January 14, 1994

APPENDIX B

DEPARTMENT OF THE AIR FORCE
USAF Medical Center Wright-Patterson (AFLC)
Wright-Patterson AFB OH 45433-5300

USAF MC REGULATION 168-50
31 March 1989

(10) Vials of reconstituted drugs must be labeled with the date of reconstitution (day, month, year), strength per unit volume, and the initials of the person preparing the product. Multi-dose vials must be dated and initialed when initially opened. All reconstituted products and multi-dose vials must be discarded no later than 30 days from the date on the label, or sooner if specifically indicated. Allergen extracts are the *only* products which may be retained up to 90 days after reconstitution or initial opening.

3. DRUG DISTRIBUTION:

a. When possible, a pharmacist will review the prescriber's original order, or a direct copy, before the initial dose of medication is dispensed.

b. All pharmacy prepackaged drug containers will be labeled by the pharmacy with the drug's generic and/or trade name, strength, control nummber, and special storage of handling instructions. Under no circumstances will medications be transferred from one bottle to another by non-pharmacy personnel

c. All drugs, including intravenous admixtures (IVs) ordered for individual inpatients, will be returned to the inpatient pharmacy as soon as the order has been discontinued.

d. When a patient is transferred from one ward to another, medications, including intravenous admixtures, should be transferred with the patient.

e. Only qualified medical personnel assigned to the USAF Medical Center Wright-Patterson (WPMC), may pick up medication from the inpatient pharmacy for delivery to the wards and clinics. Qualified means military personnel working as permanent party members of the WPMC staff, or civilian employees working at WPMC in direct patient care positions.

f. The following personnel may order and receive bulk controlled and regular drugs from the inpatient pharmacy:

(1) In keeping with the intent of AFR 168-4, paragraph 7-25(e), it is necessary that either a charge nurse or a delegated registered nurse, physician, or dentist sign the bulk order form when requesting and picking up Schedule II, III, and IV drugs for wards and clinics. An AF Form 579, Controlled Substances Register, must also be presented when picking of these bulk drugs. Personnnel, other than those mentioned above, are not permitted to sign order forms or to pick up bulk Schedule II, III, and IV drugs.

(2) When ordering bulk Schedule V drugs, the same individuals mentioned above — charge nurse or a delegated registered nurse, physician, or dentist — Must sign the bulk order form. Other medical personnnel, when authorized by letter from the respective department to the Chairperson, Department of Pharmacy, and on file in the pharmacy vault, will be permitted to sign for receipt and pick up of these bulk drugs. Such personnel should be of an NCO status or higher.

(3) When ordering non-controlled bulk drugs, a charge nurse or a delegated registered nurse, physician, or dentist, must sign the bulk order form. Other medical personnel, with no authorization by letter required, will be permitted to pick up and sign for receipt of non-controlled drugs.

g. When an announcement is received that a drug is to be suspended, recalled, or destroyed, take the following action:

(1) Pharmacy personnel will remove the recalled drug from the wards and clinics. During evenings, weekends, or

holidays, nursing units will be asked to return the item to the inpatient pharmacy and exchange if for the new merchandise.

(2) If warranted by the nature of the recall, contact all patients with current prescriptions for the drug on file in the pharmacy computer. Advise them by telephone or mail to return the medication to the pharmacy as soon as possible. Maintain the computer file to record patients contacted and return of the medication.

4. DRUG ADMINISTRATION:

a. Policies and Procedures:

(1) Drugs will be administered only upon the order of an authorized prescriber. Proper identification of the patient will be made prior to administration.

(2) All medications should be administered by appropriately authorized personnel as soon as possible after the dose has been prepared, particularly a medication prepared for parenteral administration. Except where a unit dose drug distribution system is in use, a drug should be administered by the person who prepared the dose.

* * *

5. AUTOMATIC STOP ORDERS:

c. Anticoagulants are ordered for a specified period of time, ordinarily determined on the basis of the monitoring laboratory studies.

d. Orders for oxytoxics should be written for a specified period of time.

e. All standing drug orders are automatically cancelled when a patient undergoes a major surgical procedure.

f. Nursing is responsible for establishing a uniform system for notifying the responsible practitioner of the impending expiration of a drug order so that the practitioner may determine whether the drug administration is to be continued or altered. The use of colored tabs or labels is favored for a uniform, hospital-wide stop order notification system.

6. DRUG SECURITY:

a. Medication cabinets and drug storage areas are to remain locked when not in use by authorized personnel. If the key to the narcotics cabinet is broken, lost or stolen, Facility Managment will be notified, during normal duty hours, in order to replace the key/lock. If the key is lost, broken, or stolen after normal duty hours, it will be brought to the attention of the daytime shift by the shift leader/charge nurse.

b. Each ward or section at each shift change will have a physical count of all Schedule II, III, and IV controlled drugs accomplished by two nurses, the registered nurse coming on duty and the registered nurse going off duty. An AF Form 578, Data Record, should be used to document the count. Discrepancies will be researched immediately, and all errors corrected. Discrepancies which cannot be rectified will be reported to the appropriate nurse supervisor.

c. Registered nurses, specifically designated licensed practical nurses, dentists, and physicians will be allowed to carry keys to medication cabinets and narcotic cabinets.

d. The following documentation must be created when Schedule II, III, or IV controlled substances are dispensed from or administered in the Emergency Room or Outpatient Clinic:

(1) An entry must be made by the practitioner, on SF Form 600, Health Record — Chronological Record of Medical Care, or SF 558, Record of Emergency Care and Treatment.

(2) The required information must be entered on the appropriate AF Form 579, Controlled Substances Register, including the last four digits of the sponsor's social security account number in the column entitled, "Register Number."

(3) An AF Form 781, Multiple Item Prescription, must be prepared by the practitioner, providing all required information. The person administering or dispensing the medication must then annotate the prescription by initialing it and recording the date and actual amount administered or

dispensed. These prescriptions will then be turned into the pharmacy when replacement medications are ordered.

e. Maintenance of Controlled Drug Records:

(1) All Schedule II, II, and IV drugs and other drugs specified by the Pharmacy and Therapeutics Committee will be maintained on AF Form 579. The registered nurse administering the controlled drug to the patient is responsible for making the required entry on the AF Form 579. The charge nurse for each ward is responsible for ensuring that the AF Form 579 is properly maintained.

(2) The pharmacy will issue the using activity a separate numbered AF Form 579 for each Schedule II, III, and IV controlled drug. The registered nurse from the using activity will initial the pharmacy's control log upon receipt and again when returning the completed AF Form 579 to the pharmacy.

(3) New AF Forms 579 will be issued as needed. Nursing personnel will ensure the drug balance and control number from the preceding form are brought forward to the new sheet. They will also ensure that the register number of the new form is recorded on the preceding form. Pharmacy personnel will also ensure these transfers of drug balances and register numbers are accomplished.

(4) AF Forms 579 are accountable documents and may not be transferred to another using activity or discarded.

(5) Pharmacy personnel will post all issues of controlled drugs on the AF Form 579, with the nurse initialing to indicate receipt of the drugs (see Atch 1, example B).

* * *

APPENDIX C

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 40-750
23 July 1982

Civilian Personnel

DISCIPLINE AND ADVERSE ACTIONS

This regulation establishes Air Force policy and principles for maintaining discipline and for taking disciplinary and adverse actions. It implements the requirements of 5 U.S.C. Chapter 75, 5 C.F.R., Part 752, and DOD Directive 1400.14, Personnel Actions affecting Key Personnel. It applies to employees, supervisors, civilian personnel officers, and other management officials of the Air Force.

This publication is affected by the Privacy Act of 1974. Each form that is subject to AFR 12-35, Air Force Privacy Act Program, and required by this publication, contains a Privacy Act Statement either incorporated in the body of the document or in a separate statement accompanying each document. Authority to obtain this information is Executive Order 9397. It prescribes records authorized by 5 U.S.C. Chapter 75 and Title 2, Public Law 95-454. The authority for the maintenance of the system of records required by this document is 5 U.S.C. 1302; 2951, 3301, and 3302; E.O. 10577 and E.O. 11491; 3 C.F.R. 1954-1958 Comp. page 218 and 3 C.F.R. 1966-1970 Comp. page 861.

* * *

Section E—Notices of Proposed Adverse Action, Notices of Final Decision, and Related Requirements

18. Notice of Proposed Adverse Action. The purpose of this notice is to give the employee a fair opportunity to defend himself or herself against the proposed action. The notice

must make it clear that the action is proposed but not yet decided. A statement that the notice is of a proposed action and that any answer will be considered before a decision is made is sufficient (see b(5) below).

a. The notice of proposed action must include:

(1) The proposed action, for example, "It is proposed to suspend you for 5 calendar days" (see paragraph 24).

(2) The specific reason(s) for the proposed action (see paragraphs 17b and 25).

(3) For furlough only. The basis for selecting a particular employee for furlough when some but not all employuees in a given competitive level are being furloughed.

(4) A statement of the employee's right to review the material relied on to support the reason(s) for action given in the notice *and*, at management's discretion, either: (a) a statement of what arrangements must be made to review the supporting material, or (b) a copy of the supporting material enclosed with the notice and a reference to the enclosed material (see paragraph 27).

(5) Signature of an official who has authority to propose the action (see paragraph 6).

(6) The date of the notice of proposed action. The notice is dated before delivery to the employee.

b. the notice of proposed action should but is not required to include:

(1) The duration of the notice period (see paragraph 23).

(2) A statement that the employee has a right to answer orally or in writing or both and to furnish affidavits and other documentary evidence in support of the answer (see paragraph 30).

(3) The amount of time allowed for the employee to answer and a statement that consideration will be given to extending the time if the employee requests an extesnion and provided sufficient reason for the request (see paragraph 30a).

(4) An identification of the person or office to receive any written answer; identification of the person who will receive any oral answer. The person designated must be an individual who has authority either to make or recommend a

final decision on the proposed adverse action (see paragraph 28).

(5) A statement that the action is proposed but not yet decided; that the employee's answer(s) made to a designated official will be considered; and that whether or not the employee answers, a final written decison will be issued (see paragraphs 18 and 31).

(6) The amount of offical time (if otherwise in an active duty status) allowed for the employee to review the material relied on to support the proposed action, to secure affidavits and other documentary material, and to prepare answer or answers to the notice; statement of how to arrange for the use of official time (identify the person with whom arrangements should be made); statement that consideration will be given to extending the time if the employee requires an extension and provides sufficient reason for the request (see paragraph 30a).

(7) A statement of the employee's right to representation (see paragraph 29).

(8) The name, location, and phone number of the person in the CCPO desiganted to provide assistance.

(9) The employee's duty status during the notice period.

* * *

23. Advance Notice Period:

a. Minimum Notice Period:

(1) There is no specific notice period for an oral admonishment or a reprimand.

(2) The minimum notice period for a suspension of 14 days or less *must* not be less than 24 hours. Within the Air Force, this period is normally not less than 7 days.

(3) The minimum notice period for an adverse action under paragraphs 16 and 17 is 30 days, except as provided in paragraph 16e.

b. The time periods specified in paragraph a are minimum periods and, although longer periods are not re-

quired by this document, additional time should be taken if needed to satisfy all applicable requirements. There is no requirement that a tentative date for action be set or implied at the time the notice of proposed action is issued. It is sufficient to state in the notice of proposed action that the adverse action taken, if any, will be made effective "not earlier than (specify the number of days of advance notice) days from the date you receive this notice."

24. **Identification of the Proposed Action.** State specifically the most severe action proposed. Suspensions, other than those of indefinite duration, are stated in terms ot the exact number of calendar days. A proposed action may later be reduced, but a more severe action cannot be taken unless the employee is given a new advance notice to propose the more severe action, proposing the most severe action under all circumstances on the expectation that it may later be reduced is not recommended. When reduction in pay is involved, state the exact salary the employee is to receive. For change to lower grade, state the exact position title and grade the employee will receive. For change to lower grade within or between pay systems when there is not entitlement to grade retention, add a statement as to whether or not the employee is entitled to pay retention.

25. **Specific Reasons (Includes Causes of Action).** The notice of proposed action informs the employee of all the specific reasons relied on to support the proposed action. (For reprimands, this information is included in the notice of reprimand.) It is not necessary to include every reason that *might* have been used to support managment's action. The current cause of action normally is covered in the introductory paragraph of the notice of proposed action with supporting reasons (such as prior offenses) addressed in separate paragraphs. Causes for adverse action may be reasons personal to the employee such as on or off-the-job misconduct, delinquency, or physical or mental inability to perform the

duties of the position. Causes also may be impersonal reasons such as the application of new or revised classification standards or the need to correct a merit promotion error. The management official who initiates the action is responsible for identifying and properly stating the cause(s) of action.

26. Addition of Reasons. If a notice is amended to add further reasons for action, management must make sure that the employee is given sufficient time to answer the added reasons and that no action is taken until the required number of days of advance notice has elapsed from the date the added reasons are submitted to the employee.

27. Material Relied on To Support the Action. Management assembles the material relied on to support the reason(s) for the proposed action and makes the file available to the employee. This material may include, but is not limited to, statements of witnesses, documents, investigative reports or extracts from the reports, and relevant material concerning any previous record or action relied upon as part of the basis for the current action. A copy of the supporting material may, at management's discretion, be enclosed with the notice of proposed action. If this is done, the notice includes a statement that a copy of the material is enclosed. Since all supporting material must be open to review by the employee, the employee's representative, or the employee's designated physician under 5 C.F.R. 297.204(c), material which cannot be shown to these individuals because its disclosure would violate a pledge of confidence, or because it is in some way restricted or classified, cannot be used to support reasons for the action. If management wishes to use such material, it must obtain it in a form which can be made available for the employee's review. See FPM Chapter 752, Subchapter 3.

* * *

Supreme Court, U.S.
FILED
JAN 4 1995
OFFICE OF THE CLERK

No. 94-596

In the Supreme Court of the United States

OCTOBER TERM, 1994

ALICE B. HUGHES, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

FREDDI LIPSTEIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Merit Systems Protection Board has jurisdiction under the Civil Service Reform Act of 1978 to review an agency's suspension of an employee for less than 14 days.

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In the Supreme Court of the United States

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No. 94-596

ALICE B. HUGHES, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 8a) is unreported, but is noted at 11 F.3d 1069 (Table). The initial decision of an Administrative Judge (AJ) of the Merit Systems Protection Board (MSPB) (Pet. App. 4a) is unreported. The final MSPB decision (Pet. App. 6a-7a) is unreported, but the decision is noted at 56 M.S.P.R. 37 (Table).

JURISDICTION

The judgment of the court of appeals was originally entered on October 7, 1993. Pet. App. 8a. Judgment was withdrawn and reentered on January 14, 1994. Pet. App. 10a. The petition for a writ of certiorari was filed on

March 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At the time of the events in issue, petitioner was employed by the United States Department of the Air Force as a licensed practical nurse (LPN) in the Internal Medicine Clinic at Wright-Patterson Air Force Base in Ohio. Her duties included substituting for registered nurses in the Gastroenterology (G.I.) clinic. Pet. 4. Since 1986, petitioner had been permitted to carry keys to the clinic's drug cabinet. On October 1, 1990, upon request by her supervisor, Lt. Col. Oczkowski, she surrendered the keys.[1] Pet. 5-6. Until the end of the month of October, 1990, petitioner worked in the G.I. clinic without incident. Pet. 5.

On October 29, 1990, petitioner refused to perform her assigned duties in the G.I. clinic. Pet. 6. On October 30, Lt. Col. Oczkowski notified her that her refusal to perform an assignment was unacceptable and that she would be assigned to work in the G.I. clinic on November 2, 1990. At that time, petitioner orally refused to accept the November 2 assignment. On October 31, petitioner's immediate supervisor, Major Rose Barrientez, completed a counseling report on petitioner's refusal to accept the November 2 assignment to the G.I. clinic, in which she informed petitioner that if she refused to comply with the direct order she would be suspended for five days without pay.

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[1] According to agency regulations, only "specifically designated" licensed practical nurses will be allowed to carry keys to medication cabinets and narcotic cabinets. USAF MC Reg. 168-50(6)(c) (1989). Pet. App. 14a.

On November 2, petitioner refused, once again, to work in the G.I. clinic, stating that she felt very "uncomfortable" working there without keys to the drug cabinet. Pet. 7. Petitioner was concerned that she would be unable to accommodate the needs of the patients when she was working alone in the recovery area if she did not have access to the prescription medications. Petitioner has asserted that she was told to "go home and leave the building" when she refused to perform her assignment. Pet. 7. She left the building on November 2, 1990, and did not return until November 9, 1990. Pet. 7. On November 6, 1990, petitioner's supervisor notified her that she was AWOL. Pet. 7. According to agency records, petitioner was AWOL from November 2 to 9, 1990. Pet. 7-8.

Upon her return on November 9, 1990, petitioner again refused a direct order to work in the G.I. clinic, but she did work in the clinic at a later date. Pet. 7-8. On December 21, 1990, the agency sent petitioner a notice of proposed suspension for failure to comply with orders on November 2 and 9, 1990. Pet. 8. The notice advised petitioner that she had 21 days in which to reply to the charges, and petitioner responded in writing. Pet. 8. On January 25, 1991, after considering petitioner's response, the agency issued a decision suspending petitioner for two days, January 30 and 31, 1991. Following that suspension, petitioner performed her assigned duties in the G.I. clinic without incident. Pet 8.

Petitioner appealed the January 30 and 31, 1991, suspension to an arbitrator pursuant to an agreement between her union and the Air Force. Pet. App. 1a-3a. After a hearing on June 7, 1991, the arbitrator denied petitioner's appeal because "her refusal to obey a direct order [to work in the G.I. clinic] was not warranted." *Id.* at 2a-3a.

Petitioner appealed both the five-day and the two-day suspensions to the MSPB. Pet. App. 4a-5a. On July 23, 1992, an Administrative Judge (AJ) dismissed petitioner's appeal, on the ground that the MSPB does not have jurisdiction over agency suspensions of 14 days or less. Petitioner sought review of the AJ's decision by the Board. The MSPB denied the petition for review of the initial decision because the petition did not meet the criteria for review set forth at 5 C.F.R. 1201.115.[2] Pet. App. 6a-7a. On October 7, 1993, the Federal Circuit summarily affirmed the MSPB's decision. *Id.* at 8a.[3]

ARGUMENT

1. The jurisdiction of the MSPB is not plenary, but is "limited to those matters over which it has been given jurisdiction by statute or regulation. * * * The Board does not have jurisdiction over all actions that are alleged to be incorrect." *Weaver* v. *Department of Agriculture*, 55 M.S.P.R. 569, 573 (1992). The MSPB has jurisdiction to hear appeals from employees seeking corrective action with respect to "a suspension for more than 14 days." 5 U.S.C. 7512(2).[4] The Board does not

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[2] Section 1201.115(c), 5 C.F.R., provides, in relevant part, that "[t]he Board * * * may grant a petition for review when it is established that * * * (2) The decision of the judge is based on an erroneous interpretation of statute or regulation."

[3] After learning that the petitioner was erroneously advised of the date on which the court's judgment was entered, the Federal Circuit withdrew its decision and reissued its judgment on January 14, 1994. Pet. App. 10a.

[4] Subchapter I of Title 5 (Sections 7501-7504) provides for suspensions of 14 days or less. Under Section 7503, an employee may be suspended for 14 days or less "for such cause as will promote the efficiency of the service." Section 7503 also sets forth the procedures to which an employee is entitled prior to such a suspension. That Subchapter does not, however, give an employee

have jurisdiction under any statute or regulation over suspensions of 14 days or less. *Fidler* v. *United States Postal Service*, 53 M.S.P.R. 440 (1992); *Harrison* v. *United States Postal Service*, 26 M.S.P.R. 37, 39 (1985); *Powell* v. *Department of Army*, 9 M.S.P.R. 237 (1981). Petitioner was suspended for five days in November, 1990, and for two days on January 30 and 31, 1991. Pet. 7-8. Because neither of petitioner's suspensions covered a period of time greater than 14 days, the MSPB did not have jurisdiction over her appeal. Consequently, the MSPB correctly denied petitioner's petition for review of her suspensions. See *Saunders* v. *MSPB*, 757 F.2d 1288, 1290 (Fed. Cir. 1985).

2. With respect to the two-day suspension, the Air Force fully complied with its applicable regulations. See AFR 40-750 (1982) (Pet. App. 16a-20a). The agency provided petitioner with written notice of the agency's intent to suspend her for her refusal to work on November 2 and November 9. She was given 21 days in which to reply in writing to the allegations, and she availed herself of that opportunity. Pet. 8. The agency carefully considered her response and issued a notice of suspension based on her failure to follow direct orders on the dates in question.

As to the five-day suspension, the Air Force complied with AFR 40-750 (1982) but did not fully comply with the procedures set out in 5 U.S.C. 7503. AFR 40-750 (1982) (Pet. App. 16a-20a) provides that "[t]he minimum notice period for a suspension of 14 days or less *must* not be less than 24 hours. Within the Air Force, this period is

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the right to appeal an adverse decision to the MSPB. Subchapter II (Sections 7511-7514), dealing with suspensions for more than 14 days, *does* entitle an employee to appeal an adverse action to the MSPB. Section 7513(d).

normally not less than 7 days." AFR 40-750(23)(a)(2) (1982) (Pet. App. 18a). Although petitioner received less than the normal seven days' notice for the five-day suspension, the Air Force nevertheless complied with the regulation by providing her with at least 24 hours' notice. In addition, the Air Force informed petitioner of the potential consequences of her refusal to perform her assigned responsibilities prior to the date that she actually refused to work in the G.I. clinic. She thus had an opportunity to avoid the suspension by fulfilling her responsibilities as instructed. Section 7503(b), however, entitles an employee to written notice in advance stating specific reasons for the proposed action, a reasonable time to answer orally and in writing, representation by an attorney or other representative, and a written decision and the reasons therefor at the earliest practicable date. The agency's failure to comply strictly with these procedures in the context of the five-day suspension, however, does not constitute a basis for appeal to the MSPB. As noted above, Subchapter I does not provide an employee with the right to an appeal and does not confer jurisdiction over such an appeal upon the MSPB. See 5 U.S.C. 7501-7504.

3. Petitioner's claim that the revocation of her access to the secured prescription drug area is analogous to the revocation of a security clearance (Pet. 10) is presented for the first time in this Court. "Though, when reviewing a judgment of a federal court, [this Court has] jurisdiction to consider an issue not raised below, * * * [it is] generally reluctant to do so." *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984). In any event, petitioner's reliance on *Egan* v. *Department of Navy*, 28 M.S.P.R. 509, 519 (1985), aff'd, 868 F.2d 1277 (Fed. Cir.), rev'd, 484 U.S. 518 (1988), is misplaced. In *Egan*, the Board addressed an employee's removal from his position

as a labor leader because he was unable to obtain a security clearance. In that case the Board held that:

> in an adverse action *over which the Board has jurisdiction* and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination. However, the Board will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process.

Egan, 28 M.S.P.R. at 519 (emphasis added); see also *Department of Navy* v. *Egan*, 484 U.S. 518, 525-534 (1988). Here, unlike *Egan*, no adverse action was taken against petitioner as a direct result of her loss of access to the prescription drug area; petitioner was suspended for *her* refusal to comply with work assignments after her access was revoked. In addition, the Board here, unlike in *Egan*, did not have jurisdiction over the adverse action that was taken against petitioner, because her suspension was for less than 14 days. See pp. 4-5, *supra*.

4. Petitioner's assertion that loss of access to the drug cabinet was tantamount to a demotion (Pet. 14) is incorrect. In some instances, agency action may constitute a constructive demotion if the action results in the employee's receiving a lower pay rate or different job duties. See *Randall* v. *United States Postal Service*, 59 M.S.P.R. 199 (1993) (employee assigned to lower-graded position pursuant to agency restructuring presented non-frivolous allegation of Board jurisdiction). Petitioner, however, has continued to work in the G.I. clinic, performing her prior duties at the same pay rate. Pet. 8.

Finally, petitioner's claim that withdrawal of her keys to the drug closet violated her due process rights is frivolous. Air Force regulations plainly state that only

"specifically designated licensed practical nurses * * * will be allowed to carry keys to the medication cabinets and narcotic cabinets." USAF MC Reg. 168-50(6)(c) (1989) (Pet. App. 14a). Because petitioner had no statutory right to carry the keys, the agency's request for the return of the keys did not deprive her of any interest protected by the Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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